

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

LARRY G. PHILPOT,

Plaintiff

V.

**FUTUREHEALTH, INC., and ROBERT
KALL d/b/a OPEDNEWS**

Defendants.

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Civil Action No.

PLAINTIFF’S ORIGINAL COMPLAINT AND JURY DEMAND

Plaintiff Larry G. Philpot (“Philpot” or “Plaintiff”) files this Original Complaint and Jury Demand against Defendants Futurehealth, Inc. (“Futurehealth”) and Robert Kall d/b/a OpEdNews (“Kall”) (collectively, “Defendants”) on personal knowledge as to all facts regarding himself and on information and belief as to all other matters, as follows:

I.

PRELIMINARY STATEMENT

A professional photographer’s ability to envision, and then immediately capture the entire scene—including non-visuals such as emotions—is what differentiates their photographs from an amateur’s photographs. These works extend well beyond the four corners of the photograph to evoke sentiments within the viewer so that the viewer is forever a part of the moment captured in time. For concert photographers, the odds are almost always against them—the musicians are constantly moving, the lighting is usually dark and typically changing, and it is practically impossible to secure a good vantage point. But every now and then, a photographer captures a great shot, the kind of iconic shot that makes the viewer forever a part of that very moment in time.

Larry Philpot, an experienced freelance photographer, has honed the art of capturing these rare moments in time. Philpot created a photograph of Tom Petty during a concert. This photograph is the type of awe-inspiring work that launches a successful photography career. Recognizing this, Philpot offered the photograph under a Creative Commons license, permitting members of the public to use the photograph provided that it is properly attributed to Philpot. In doing so, Philpot carefully marketed his sought-after product while still protecting the quality and his rights in his work.

Defendants Futurehealth and Kall copied and posted Philpot's photograph of Tom Petty onto their website as their own, thereby infringing on Philpot's copyrighted work. In freelance photography, the reputation and licensing revenue guarded by copyright law are a photographer's sole means to support their career. Futurehealth and Kall stole both of those from Philpot. Larry Philpot brings this action to protect not just his rights under copyright law, but also his photography business.

II.

PARTIES

A. Plaintiff

1. Plaintiff Larry G. Philpot is a citizen and resident of the State of Indiana. Philpot is a renowned freelance professional photographer who specializes in photographing concerts and musical performances across the United States.

B. Defendant

2. Defendant Futurehealth, Inc. is a Pennsylvania corporation with its principal place of business in Pennsylvania and resides in Bucks County. Futurehealth may be served at its registered office at 6273 Kindred Street, Philadelphia, Pennsylvania 19149.

3. Defendant Robert Kall d/b/a OpEdNews is a Pennsylvania citizen who may be served at 211 N. Sycamore Street, Newtown, Pennsylvania 18940 or wherever he may be found.

III.

JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 because this civil action presents a federal question as Plaintiff presents a civil claim arising under the Constitution, laws, or treaties of the United States.

5. This Court also has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1338(a) because this civil action arises under an Act of Congress relating to copyrights, namely the Copyright Act of the United States, 17 U.S.C. § 101, et seq.

6. This Court has personal jurisdiction over Defendants Futurehealth, Inc. and Robert Kall d/b/a OpEdNews because they conduct business and reside in the State of Pennsylvania.

7. Venue is proper in this District pursuant to 28 U.S.C. §§ 1391(b) and 1400(a) because Defendants Futurehealth, Inc. and Robert Kall d/b/a OpEdNews reside and may be found in this District.

IV.

FACTUAL BACKGROUND

A. The Highly Competitive World of Freelance Concert Photography

8. To say that concert photography is a tough business is a severe understatement. It requires artistic skills, business skills, and interpersonal skills. Before having the opportunity to

even take a photo, concert photographers must invest in expensive equipment and negotiate to obtain access to the concert stage. At the concert, they must battle all the variables that arise from an uncontrolled setting—a rowdy crowd, horrible lighting that is always changing, and musicians constantly moving. Not to mention, it is really loud. As a result, despite all of their efforts and hard work, concert photographers often take photographs that are entirely unusable, where the rock stars appear as blurs and washy blobs.

9. Financially, concert photography can be a high-risk business venture. Freelance concert photographers earn money when they license or sell their work product and from photography engagements. If the photographs are unusable, which is often the case, or simply aren't good, then the photographers do not receive any type of payment and are unable to expand their portfolio—which is necessary to obtain additional business.

10. And, in today's technological age where anyone with a smart phone can take pictures at concerts, concert photography is becoming significantly more competitive, making it even more imperative to capture the perfect shot. Because that is all that there is demand for—a few once-in-a-lifetime shots for each star. It doesn't matter if a concert photographer takes 100 good shots of a star at a concert—an article about Tom Petty, for example, only needs one picture of Tom Petty—the best one.

11. In such a cutthroat environment, it is essential that concert photographers receive the compensation and credit to which they are entitled, but also need to advance their business.

12. Each and every instance where a photographer does not receive proper attribution, or his work is misattributed, decreases the value of that photograph and the overall value of the photographer's portfolio.

B. Larry Philpot: A Professional Concert Photographer

13. Larry Philpot is a renowned freelance photographer who specializes in taking photographs of musicians at concerts and other performances. Philpot has distinguished himself from amateur photographers by creating a highly coveted portfolio that demands legal protection to preserve its standard.

14. He has spent years perfecting his craft, and his photography business includes licensing his works and photography engagements.

15. Philpot is known for the unparalleled quality of his work. He employs photography techniques that involve precise angles, timing, assessment of light, and other creative approaches that he has worked tirelessly to develop. At a concert, Philpot has the uncanny ability of connecting with the artist from the crowd. In addition, to ensure the highest quality photographs, Philpot uses state of the art equipment. He has invested tens of thousands of dollars in equipment.

16. He has established a strong reputation for himself and his work, and due to his professional reputation, he often obtains privileged access to take photographs of musical performers at concerts. Indeed, there are over one hundred instances where Philpot has received press credentials.

17. There is an extensive market and a demand for Philpot's photos that includes, but is not limited to, the musicians themselves, the musicians' fans, record labels, talent agencies, editorial organizations, media entities, radio stations, website operators, and concert and event planners. Philpot has been very successful in this market.

18. Philpot understands that part of being a professional photographer is to market your works to gain widespread exposure, and that the high use of his photographs has required licensing agreements and copyright protections.

19. Philpot has entered into license agreements with Tom Petty and the Heartbreakers for his photographs.

20. Philpot has also licensed his work to various musicians in exchange for attribution including, but not limited to, the musicians Kid Rock and Paul Stanley of KISS.

21. Further, Philpot has previously licensed several of his photographs through a stock photography agency called “Corbis” and its affiliate “Splash.” Philpot received monetary compensation through Corbis and Splash for licenses for photographs he took of Prince, Madonna, Fleetwood Mac, and the 2015 Indianapolis 500 Race and Winner.

22. Philpot has also been engaged as a photographer by Hoosier Park LLC d/b/a Hoosier Park Racing & Casino to photograph “meet and greets” between celebrities and fans.

23. Philpot’s portfolio and reputation as a premier photographer are critical to his business. The more his photographs are viewed with proper attribution, the more access he can obtain to take celebrity photographs, and the more he can command in licensing fees.

C. Philpot Creates the Tom Petty Photograph

24. On June 28, 2013, Philpot created a photograph of Tom Petty in Milwaukee, Wisconsin (the “Tom Petty Photo”). A true and correct copy of the Tom Petty Photo is attached as Exhibit A.

25. The Tom Petty Photo is an original work that Philpot registered with the United States Copyright Office as part of a collection of photographs on August 14, 2013. The Tom Petty Photo is registered with the United States Copyright Office under Certificate Number VAu 1-164-624. A copy of the copyright registration certificate for the Tom Petty Photo is attached as Exhibit B.

26. As the owner of the copyright in the Tom Petty Photo, Philpot has the exclusive rights to (1) reproduce the Tom Petty Photo in copies, (2) prepare derivative works based on the

Tom Petty Photo, (3) distribute copies of the Tom Petty Photo to the public by sale or other transfer of ownership, or by rental, lease, or lending, and (4) display the Tom Petty Photo publicly.

27. Philpot first displayed the Tom Petty Photo on September 12, 2013 on the Wikimedia website. The original photo can be found at [http://commons.wikimedia.org/wiki/File:Tom Petty 2013.jpg](http://commons.wikimedia.org/wiki/File:Tom_Petty_2013.jpg). A copy of this webpage as it existed on January 18, 2018 with the Tom Petty Photo is attached as Exhibit C.

D. The Creative Commons License

28. A Creative Commons license is a simple, standardized copyright license that anyone can use to license their work. The copyright holder designates their work as governed by a Creative Commons license, and anyone may use the work provided they adhere to the terms of the license.

29. In an effort to market his freelance photography practice, Philpot offered the Tom Petty Photo through Wikimedia for distribution, public display, and public digital performance under a Creative Commons Attribution-ShareAlike 3.0 Unported Generic license (abbreviated as “CC BY-SA 3.0”). A copy of the CC BY-SA 3.0 license is attached as Exhibit D.

30. This license allows anyone to use the work, provided that they, among other requirements:

- a. Include a copy of the Uniform Resource Identifier for the CC BY-SA 3.0;
- b. Provide attribution to the author of the work; and
- c. Provide the Uniform Resource Identifier that the licensor specifies to be included with the work.

E. Restrictions on the Tom Petty Photo

31. Larry Philpot provided the following description on the Wikimedia website for the Tom Petty Photo, “Tom Petty strikes a pose in Milwaukee at Summerfest, June 28, 2013.” Philpot

also provided the following attribution requirement: “Credit: Photo by Larry Philpot, www.soundstagephotography.com.”

F. Futurehealth and Kall Infringe Philpot’s Copyright in the Tom Petty Photo.

32. Futurehealth and Kall infringed Philpot’s copyright in the Tom Petty Photo by publishing, copying, and displaying the Tom Petty Photo on the OpEdNews website at https://www.opednews.com/articles/The-Sad-Song-of-Political-by-Meryl-Ann-Butler-Artists_Copyright_Knaan_Music-150912-467.html, https://www.opednews.com/populum/cachedimages/s_500_opednews_com_0_screen-shot-2015-09-12-at-6-13-28-pm-png_1820_20150912-117.gif, and <https://www.opednews.com/populum/attrdetails.php?vid=126209>. A copy of these webpages as they appeared with the Tom Petty Photo is attached as Exhibit E.

33. Futurehealth and Kall did not provide attribution to Philpot when it published the Tom Petty Photo.

34. Futurehealth and Kall did not list or link to Philpot’s website, soundstagephotography.com when it published the Tom Petty Photo.

35. Philpot discovered these infringements on May 29, 2017.

G. The Damage Done

36. Defendants Futurehealth and Kall passed off Philpot’s Tom Petty Photo as their own, ignoring Philpot’s primary requirement under the Creative Commons license to allow Defendants Futurehealth and Kall to use his copyrighted work—the credit. Philpot has been deprived of the credit for taking the exceptional Tom Petty Photo.

V.

CLAIMS

A. Count One: Copyright Infringement

37. Plaintiff realleges and incorporates the allegations set forth in the preceding paragraphs as if set forth in full herein.

38. Defendants Futurehealth and Kall operated and operate the OpEdNews website.

39. Defendants Futurehealth and Kall published, copied, and displayed the Tom Petty Photo at https://www.opednews.com/articles/The-Sad-Song-of-Political-by-Meryl-Ann-Butler-Artists_Copyright_Knaan_Music-150912-467.html,
https://www.opednews.com/populum/cachedimages/s_500_opednews_com_0_screen-shot-2015-09-12-at-6-13-28-pm-png_1820_20150912-117.gif, and
<https://www.opednews.com/populum/attrdetails.php?vid=126209>.

40. Defendants' acts are and were performed without the permission, license, or consent of Plaintiff.

41. Defendants acted with willful disregard of the laws protecting Plaintiff's copyrights.

42. Defendants infringed Plaintiff's copyrights in the Tom Petty Photo in violation of 17 U.S.C. § 501.

43. Plaintiff has sustained and will continue to sustain substantial damage in an amount not yet fully ascertainable, including but not limited to damage to his business reputation and goodwill.

44. Plaintiff is informed and believes and thereon alleges that the Defendants have obtained profits recoverable under 17 U.S.C. § 504. Plaintiff will require an accounting from the Defendants of all monies generated from the Tom Petty Photo.

45. In the alternative and at his election, Plaintiff is entitled to seek maximum statutory damages for each work willfully infringed by Defendants in an amount of \$150,000 per work infringed. In the event that the trier of fact does not find that Defendants willfully infringed Plaintiff's copyrights, Plaintiff is entitled to seek maximum statutory damages for each work infringed by Defendants in an amount of \$30,000 per work infringed.

46. Plaintiff has suffered and continues to suffer irreparable harm and damage as a result of the above-described acts. Accordingly, Plaintiff seeks permanent injunctive relief pursuant to 17 U.S.C. § 502, as well as seizure of the Tom Petty Photo.

47. Plaintiff is entitled to recover from the Defendants his attorney's fees and costs of suit, pursuant to 17 U.S.C. § 505.

VI.

JURY DEMAND

Plaintiff hereby demands a trial by jury on all issues so triable.

VII.

RELIEF REQUESTED

WHEREFORE, Plaintiff demands that judgment be entered against Defendants as follows:

1. Pursuant to 17 U.S.C. § 502, that Defendants, their agents, servants, employees, representatives, successors and assigns, and all persons, firms, corporations, or other entities in active concert or participation with Defendants, be permanently enjoined from directly or indirectly infringing the Plaintiff's copyrights in any manner, including generally, but not limited to reproducing, distributing, displaying, performing or making derivatives of any of the Tom Petty Photo;

2. Pursuant to 17 U.S.C. § 504, that Defendants be required to pay actual damages and disgorgement of all profits derived by Defendants from their acts of copyright infringement;

3. That Defendants be required to perform a complete and full accounting of all profits generated by Defendants from the Tom Petty Photo;

4. Pursuant to 17 U.S.C. § 504, that upon Plaintiff's election, Defendants be required to pay statutory damages up to \$150,000 for each work infringed for their acts of copyright infringement, and in the event the factfinder determines that Defendants' infringement was not willful, that Defendants be required to pay statutory damages up to \$30,000 for each work infringed for their acts of copyright infringement;

5. Pursuant to 17 U.S.C. § 505, Defendants be required to pay Plaintiff the costs of this action, prejudgment interest, and reasonable attorney's fees; and

6. Plaintiff be granted all other and further relief to which he is entitled.

Dated: May 26, 2020

Respectfully submitted,

KLAPROTH LAW PLLC

/s/ Jesse C. Klaproth

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